No. 14-915

In the
Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,
Petitioners,
v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CONSITUTIONAL LAW PROFESSORS, THE JUDICIAL EDUCATION PROJECT, AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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September 2015

QUESTIONS PRESENTED

1. Whether *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), should be overruled and public-sector "agency shop" arrangements invalidated under the First Amendment.

2. Whether it violates the First Amendment to require that public employees affirmatively object to subsidizing non-chargeable speech by public-sector unions, rather than requiring that employees affirmatively consent to subsidizing such speech.

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INTEREST OF *AMICI CURIAE*[1]

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Individual *amici* have no personal stake in the outcome of this case; their interest is in seeing the proper application of this Court's First Amendment precedent in the public union setting.

Amicus Judicial Education Project ("JEP") is dedicated to strengthening liberty and justice in

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[1] Rule 37 statement: All parties have consented to the filing of this *amici* brief. Further, no part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

America through defending the Constitution as envisioned by its Framers: creating a federal government of defined and limited powers, dedicated to the rule of law and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as judges' role in our democracy.

Amicus Center for Constitutional Jurisprudence is the public interest arm of the Claremont Institute. The Center and the Claremont Institute share the mission of restoring the principles of the American Founding to preeminent authority in our national life, including the protection for freedom of conscience enshrined in the First Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

Public employee unions have the extraordinary power to compel the payment of agency fees by nonunion members in roughly half the States in the Nation. This Court recognized in *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977), that such compulsion involves a significant impingement of dissenters' First Amendment rights. *Abood* tolerated this impingement, however, on the remarkable premise that it was not fair *to the union* to advocate for members and nonmembers *unless* it has the power to compel agency fees—even though unions advocate aggressively for public employees in many States (and in the federal government) where that very same compulsion is forbidden by law. The Court observed in *Knox v. Service Employees*, 132 S. Ct. 2277, 2290 (2012), that *Abood*'s result was "something of an anomaly." That was an understatement.

Abood was an outlier the day it was decided. It placed the "common cause" of the public employee union over the First Amendment interests of the dissenting employee to justify compelling payment of an agency fee to subsidize the union's First Amendment activity. These "common cause" interests were the preservation of "labor peace" and avoiding the so-called "free rider" problem.

Since the foundational decision in *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), however, the Court has analyzed compelled speech cases by starting with the presumption that an individual speaker controls his or her message regardless of the asserted collective in-

terests purportedly justifying compelled speech or compelled subsidies to third parties' speech. In the years following *Abood*, the Court has only strengthened this presumption—what it has described as "the general rule of speaker's autonomy," *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 578 (1989)—and applied it in a number of contexts to invalidate government-mandated speech.

While *Abood* heeded many of these fundamental principles in concluding that so-called "ideological" union expenditures could not be compelled (the "non-chargeable" portion of the agency fee), it ignored them in concluding that the rest of the agency fee (the "chargeable" portion) could be compelled over the objection of employees who refused to join the union. This brief focuses on the chargeable portion.

The Court recently detailed how *Abood* failed to recognize the important differences between public and private unions by relying on cases applying labor law to private industry. *See Harris v. Quinn*, 134 S. Ct. 2618, 2630-34 (2014). At a more basic level, however, *Abood*'s elevation of the collective goals of the union over the objectors' individual beliefs violates core First Amendment principles in a variety of ways. This fundamental mistake caused *Abood*'s treatment of the chargeable portion of the agency fee to stray far outside of this Court's teachings on what the First Amendment requires.

The Court should overrule or overhaul *Abood* to end the ongoing damage being done to public employees' First Amendment rights throughout the Nation.

ARGUMENT

I. *Abood*'s Reliance On The "Common Cause" Objective As The Justification For Compulsion Violated The Fundamental Rule Of Individual Speaker Autonomy.

Abood's tolerance for the "chargeable" component of compelled agency fees has persisted for too long as a special exception to mainstream First Amendment principles.

A. *Abood* Itself Recognized That Compelling An Agency Fee Impinges On First Amendment Interests.

The controlling opinion in *Abood* correctly acknowledged that forcing public employees to pay an agency fee impinges on their speech rights in light of the collective-bargaining uses to which that money would be put:

> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. . . To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate

> for the advancement of ideas, or to refrain from doing so, as he sees fit.

431 U.S. at 222-23.

Abood, however, simply accepted as a given that the same reasons for tolerating this constitutional impingement in the private sphere applied equally in the case of public employee unions:

> [T]he judgment clearly made in *Hanson* and *Street* is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress. "*The furtherance of the common cause* leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy."

431 U.S. at 222-23 (quoting *Machinists v. Street*, 367 U.S. 740, 778 (1961)) (emphasis added) (footnote omitted). As the Court recently explained in *Harris v. Quinn*, 134 S. Ct. 2618 (2014), *Abood* was mistaken in its assumption that *Railway Employees v. Hanson*, 351 U.S. 225 (1956), and *Street* settled the First Amendment issues associated with compulsory union dues in the *public* sector. *See Harris*, 134 S. Ct. at 2630-34 ("The *Abood* Court seriously erred in treating *Hanson* and *Street* as having all but decided the constitutionality of compulsory payments to a public-sector union.").

Abood tolerated this impingement for the "common cause" up to the point that the union's speech activities became nakedly partisan or "ideological." 431 U.S. at 232-36. It created the chargeable/non-chargeable distinction as the supposed "remedy" for improperly compelled speech on the non-chargeable side of the line, looking again to Congressional private-sector labor policy as the guidepost. *Id.* at 237-40 (relying on *Street* and *Railway Clerks v. Allen*, 373 U.S. 113 (1963), and noting that the "task" of formulating the prophylactic remedy was "simplified by the guidance to be had from prior decisions").[2]

Since *Abood*, public-sector agency fee payers have thus been lumped into the ongoing debates about where the line should be drawn. *Harris*, 134 S. Ct. at 2633 (noting that "the Court has struggled repeatedly with [the chargeability] issue."). *See, e.g., Lehnert v. Ferris Faculty Ass'n*,

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[2] Three Justices disagreed strongly with this approach. Writing for them, Justice Powell concurred only in the judgment that the complaint established a First Amendment claim. *Abood*, 431 U.S. at 244 (Powell, J., concurring in the judgment). He went on to explain why there was no "basis here for distinguishing 'collective-bargaining activities' from 'political activities' so far as the interests protected by the First Amendment are concerned." *Id.* at 257; *see also id.* at 261("I would have thought the 'conflict' of ideas about the way in which government should operate was among the most fundamental values protected by the First Amendment." *Id.* at 261. As *Harris* and the intervening years have shown, *Abood*'s conclusion that "[t]he differences between public- and private-sector collective bargaining simply do not translate into differences in First Amendment rights," 431 U.S. at 232, is surely wrong. *See Harris*, 134 S. Ct. at 2632-33.

500 U.S. 507 (1991) (establishing three-part test for determining whether an activity is chargeable or nonchargeable); *Locke v. Karass*, 555 U.S. 207 (2009) (considering whether union's national litigation expenses were properly chargeable to local nonmembers and observing that "in principle, the government may require [an agency fee] without violating the First Amendment," *id.* at 210).

But focusing on the hazy distinction between chargeable and non-chargeable components of the agency fee obscures the deeper First Amendment problems underlying the forced payment for either component in the first place.[3] Indeed, the line-drawing exercise speaks only to the *purposes* for which the non-union member has been compelled to subsidize the union's speech, not *whether* compulsion has occurred. In light of that compulsion, there is no question that the *entire* agency fee works a "significant impingement" of the fee-payor's First Amendment rights.[4]

On the "chargeable" side of the line, the funds are being taken, by law, directly from the non-

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[3] Ironically, *Abood* has been cited many times as *supporting* the mainstream rule that speakers cannot be forced to subsidize speech with which they disagree—but only as to the non-chargeable portion. This may explain, at least in part, why the chargeable portion of the compelled agency fee has avoided close constitutional scrutiny for so long.

[4] *See Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984) (even in the private sector, "by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights"). Echoing *Abood*, the *Ellis* court observed that "such interference with First Amendment rights is justified by the government interest in *industrial* peace." *Id.* at 455-56 (emphasis added).

consenting employee's paycheck for a form of lobbying and speech directed at the government—here, that teachers should have higher salaries, inflexible tenure rules, more generous pensions, and so on. *See Harris*, 134 S. Ct. at 2632 ("In the public sector, core issues such as wages, pensions, and benefits are important political issues," and "[i]n the years since *Abood*, as state and local expenditures have mushroomed, the importance of the difference between bargaining in the public and private sectors have been driven home").

Harris examined *Abood*'s shortcomings in a number of important areas. *Amici* add to that list here by focusing on core First Amendment principles. In short, *Abood*'s elevation of so-called "common cause" interests as a justification for compelled subsidization of the union's speech cannot be reconciled with the Court's general First Amendment rule, expressed in a broad array of decisions, that individuals control their speech and beliefs.

This mistake took *Abood* outside the mainstream of First Amendment jurisprudence when it was decided, and, as First Amendment doctrine has subsequently developed, *Abood*'s outlier status has only been magnified. Because continued adherence to *Abood* would "colli[de] with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience," *Helvering v. Hallock*, 309 U.S. 106, 119 (1940), the case should be overruled. *See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 231 (1995) (returning to an "'intrinsically sounder' doctrine established in prior cases" may "better serv[e] the values of *stare*

decisis than would following [the] more recently decided case inconsistent with the decisions that came before it."). After all, "*stare decisis* does not matter for its own sake." *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

B. The Court's Major Compelled Speech Cases Prior To *Abood* Recognized The Paramount Interest Of The Individual Speaker.

The choice between a "common cause" goal and an individual's beliefs plays out one way or another in every compelled speech case. Long before *Abood*, the Court had moved unmistakably in the direction of favoring the individual speaker's ability to control his expression over the collective goal to be achieved through compulsion.

1. The Court's first major compelled-speech decision was *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), which struck down a state statute conditioning access to public schools on saluting the American flag while reciting the pledge of allegiance. The language of West Virginia's law was "taken largely from the Court's . . . opinion" three years earlier in *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940), where the Court had *upheld* a flag salute requirement over the challenge that it violated the religious views of a Jehovah's Witness family.

In *Gobitis*, the Court characterized its task as "reconcil[ing] the conflicting claims of liberty and authority." *Id.* at 591. "When," the Court asked, "does the constitutional guarantee compel exemption from doing what society thinks necessary for the promotion of some great common end, or from

a penalty for conduct which appears dangerous to the general good?" *Id.* at 593. In refusing to strike down the flag-salute rule, the Court repeatedly emphasized the importance of subordinating individual belief in the name of promoting the "common" and "unified" good.[5]

Barnette marked a significant change of course. Without citing a single case, the Court reexamined *Gobitis* and recast the debate. 319 U.S. at 634-42. *Barnette* began with the proposition that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights *which guards the individual's right to speak his own mind*, left it open to public authorities to compel him to utter what is not in his mind." *Id.* at 634 (emphasis added); *see also id.* at 634-35 (framing the question as whether the "compulsory rite" could "infringe [the] constitutional liberty of the individual").

In just a few pages, the Court established the bedrock principle that the First Amendment protects the *individual's* "free mind" from compulsion by the state, and this interest is paramount. *Id.* at

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[5] *E.g.*, 310 U.S. at 594-95 ("mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities"), 596 (the "ultimate foundation of a free society is the binding tie of cohesive sentiment," and such "sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization"),.and 598 ("The influences which help toward a common feeling for the common country are manifold.").

637, 642. In an oft-cited passage, the Court concluded that, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.[6]

Abood referenced *Barnette* only in concluding that unions could not compel contributions for "ideological" causes, 431 U.S. at 235, despite recognizing that even the chargeable (and larger) portion of a compelled agency fee impacts a dissenter's First Amendment rights because he or she may have "ideological objections to a wide variety of activities undertaken by the union." *Id.* at 222. It thus made no effort to explain why the union's "common cause" interests justified departing from *Barnette*'s teaching.

2. Just two months before issuing *Abood*, the Court decided *Wooley v. Maynard*, 430 U.S. 705 (1977). In *Wooley*, New Hampshire citizens challenged a state law banning defacement of license plates bearing the state motto "Live Free or Die" on the grounds that it offended "their moral, religious, and political beliefs." *Id.* at 707.

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[6] The Court has since repeatedly cited the similar view of Thomas Jefferson: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Irving Brant, James Madison: The Nationalist 354 (1948). Indeed, *Abood* cited this language to justify objection to the non-chargeable portion of the agency fee, 431 U.S. at 234 n.31, not recognizing its applicability to the *entire* agency fee.

The Court analyzed the dispute squarely in the context of *Barnette*: "We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714 (citing *Barnette*). And, "as in *Barnette*," the New Hampshire law "forces an individual . . . to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable." *Id.* at 715; *see id.* at 714 (the "right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind'") (quoting *Barnette*).

While the Court considered "[c]ompelling the affirmative act of a flag salute . . . a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate," it concluded that "the difference is essentially one of degree." *Id.* at 715. As for the State's asserted interest in promoting "appreciation of history, individualism, and state pride," such collective goals could not overcome the "individual's First Amendment right to avoid becoming the courier" for an ideological message with which it disagreed. *Id.* at 716-17.

Remarkably, the *Abood* Court saw no connection between *Wooley* and the compelled payment of agency fees. *Abood* cited *Wooley* only once, in a footnote string citation of general First Amendment principles, and the Court made no effort to distinguish the case. 431 U.S. at 231 n.28.

3. In the Term before *Abood*, the Court decided *Elrod v. Burns*, 427 U.S. 347 (1976), in which

it considered the constitutionality of political patronage practices. Plaintiffs in *Elrod* alleged that they had to join the Democratic Party, "contribute a portion of their wages to the Party, or obtain the sponsorship of a member of the Party" in order to keep their jobs. *Id.* at 355. The plurality opinion cast the dispute in *Barnette*-like terms, focusing on the individual's beliefs: "[A] pledge of allegiance to another party, however ostensible, only serves to compromise the individual's true beliefs." *Id.* at 355-56. The important interests of "effective government and efficiency of public employees" fostered by patronage could not satisfy the plurality's least-restrictive-means test. *Id.* at 363-64. *See also Branti v. Finkel*, 445 U.S. 507, 513-14 (1980) (noting that *Elrod* brought patronage "within the rule of cases like" *Barnette*).

The *Elrod* plurality focused on the coerced financial support inherent in patronage:

> The financial and campaign assistance that [the dissenter] is induced to provide to another party furthers the advancement of that party's policies to the detriment of his party's views and ultimately his own beliefs, and *any assessment of his salary is tantamount to coerced belief*. . . . Since the average public employee is hardly in the financial position to support his party and another, or to lend his time to two parties, the individual's ability to act according to his beliefs and to associate with others of his political persuasion is constrained, and support for his party is diminished.

Elrod, 427 U.S. at 355-56 (emphasis added). These same principles should have applied with equal force to *Abood*'s discussion of the forced agency fee the following year. But *Abood*, by contrast, minimized the agency fee's burden on the objector being forced to pay since they remain otherwise "free to participate in the full range of activities open to other citizens." *Abood*, 431 U.S. at 230.

Though he dissented in *Elrod*, Justice Powell's concurrence in *Abood* accepted *Elrod* as a given and explained that it could not be squared with the majority's treatment of the compelled agency fee:

> [I]f individual teachers are ideologically opposed to public-sector unionism itself, as are the appellants in this case, one would think that compelling them to affiliate with the union by contributing to it infringes their First Amendment rights to the same degree as compelling them to contribute to a political party.

431 U.S. at 257 (Powell, J., concurring in the judgment); *see also id.* at 258 ("Disassociation with a public-sector union and the expression of disagreement with its positions and objectives therefore lie at 'the core of those activities protected by the First Amendment.'" (quoting *Elrod*, 427 U.S. at 356)).

Justice Powell observed that "the public-sector union is indistinguishable from the traditional political party in this country" because the "ultimate objective of a union in the public sector . . . is to influence public decisionmaking," to "obtain favorable decisions [by the government,] and to

place persons in positions of power who will be receptive to the union's viewpoint." 431 U.S. at 256-57 (Powell, J., concurring in the judgment). Yet the *Abood* majority apparently saw no connection between *Elrod*'s rule and the chargeable portion of the agency fee. It cited *Elrod* only with respect to the non-chargeable portion. *Abood*, 431 U.S. at 233-35. As the distinction between public employee unions and political parties diminishes each year—if ever there was a principled distinction—*Abood*'s failure to grapple with *Elrod* becomes more difficult to explain. *See* Edwin Vieira, Jr., *Are Public-Sector Unions Special Interest Political Parties?*, 27 DePaul L. Rev. 293 (1977).

C. Since *Abood*, The Court Has Solidified The "General Rule" Of Speaker Autonomy In Multiple Settings.

The Court has only strengthened the *Barnette*-inspired rule that the individual speaker controls her own speech in the years following *Abood*. Indeed, by 1989, the Court referred to "speaker's autonomy" as the "fundamental rule" in compelled speech cases.

In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1989), a unanimous Court found that Massachusetts' common-cause interest in anti-discrimination did not justify forcing a parade organizer to admit parade participants whose message the organizer did not support. Such use of "the State's power violates the *fundamental rule* of protection under the First Amendment, that *a speaker has the autonomy to choose the content of his own message*." *Id.* at 573 (emphasis added). (The Court later re-

ferred to this as "the general rule of speaker's autonomy." *Id.* at 578.) "Although the State may at times 'prescribe what shall be orthodox in commercial advertising' by requiring the dissemination of 'purely factual and uncontroversial information,' outside that context it may not compel affirmance of a belief with which the speaker disagrees." *Id.* at 573 (quoting *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985), and citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 386-87 (1973), and *Barnette*, 319 U.S. at 642).

The Court has applied the fundamental rule of "speaker autonomy" in additional situations:

1. *Forced Assistance To Third Parties' Speech.* The Court has consistently struck down mandatory speech-assistance regimes outside the union setting. In *Pacific Gas & Electric Co. v. Pub. Util. Comm'n of Cal.*, 475 U.S. 1 (1986), for example, the Court invoked the individual speaker's autonomy in vacating a state agency's order requiring the utility (PG&E) to disseminate, in its customer mailers, materials generated by a ratepayer advocate. The Court explained that such compelled assistance requirement "penalizes the expression of particular points of view and forces speakers to alter their speech." *Id.* at 9. The State's common-cause goal of "fair and effective utility regulation," while it "may be compelling," did not survive strict scrutiny analysis; among other things, the Court found "no substantially relevant correlation between" this interest and the compelled assistance. *Id.* at 19-20 (quoting *First Nat'l Bank of*

Boston v. Bellotti, 435 U.S. 765, 795 (1978) (internal citation omitted)).

Pacific Gas also drew from *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), which struck down Florida's "right of reply" statute when a candidate demanded access to the newspaper's editorial pages after they criticized him. *Pacific Gas* noted that the Florida statute forced the "newspaper to tailor its speech to an opponent's agenda, and to respond to candidates' arguments where the newspaper might prefer to be silent." *Pacific Gas*, 475 U.S. at 10-11 (*cf.* citation to *Wooley* and *Barnette*).

The Court has likewise rejected efforts to limit one person's speech to enhance the relative position of other speakers. In *Davis v. Fed. Election Comm'n*, 554 U.S. 724 (2008), for example, the Court rejected the so-called "Millionaire's Amendment," which was aimed at leveling electoral opportunities by limiting campaign expenditures by self-financing candidates.[7] *See also Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) ("the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

2. *Avoidance Of "Broad Prophylactic Rules" Compelling Speech.* In *Riley v. Nat'l Fed'n of*

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[7] *Abood*, of course, reached the opposite conclusion: "such interference as exists [through the agency fee] is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222.

Blind of N.C., Inc., 487 U.S. 781, 795 (1988), the state required professional fundraisers to disclose to potential donors "the percentage of charitable contributions collected during the previous 12 months that were actually turned over to a charity." The Court viewed this as a sort of "prophylactic rule of compelled speech," aimed at informing donors "how the money they contribute is spent" in light of a purported "misperception" that the money given to professional fundraisers "goes in greater-than-actual proportion to benefit charity." *Id.* at 798.

The mandatory agency fee is, in a sense, also a prophylactic rule aimed at preventing the perceived injustice of so-called "free riders" benefitting from collective bargaining. *Riley*, however, applied strict scrutiny to reject the mandated disclosure, since "more benign and narrowly tailored options [we]re available" to address the alleged problem of "donor misperception." *Id.* at 800. "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 801 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

3. *Forced Marketing Fees.* In *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), the Court considered forced association fees used primarily to market mushrooms. The Mushroom Promotion, Research, and Consumer Information Act, 7 U.S.C. § 601 et seq., authorized the Secretary of Agriculture to establish a "Mushroom Council" which, in turn, was authorized to impose mandatory assessments on growers. *Id.* at 408.

The plaintiff in *United Foods* was an objecting grower who did not want to get lumped in with the market in a generic advertising campaign, and this desire was sufficient to invalidate the forced assessment. In this context, the Court considered whether the government could "underwrite and sponsor speech" using "special subsidies extracted" from those who "object to the idea being advanced." *Id.* at 410.

In holding that such forced subsidies are unconstitutional, the Court started from a now-familiar proposition: "Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views, or from compelling certain individuals to pay subsidies for speech to which they object." *Id.* (citations omitted). The Court concluded that such "mandated support is contrary to the First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." *Id.* at 413 (citing *Abood* and *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990)).[8]

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[8] *United Foods* relied on *Abood* to guide its analysis on two broad points that *Abood* plainly got right: that the First Amendment (1) prevents the government from "compelling certain individuals to pay subsidies for speech to which they object," 533 U.S. at 410, and (2) "protect[s] against compelled assessments" to fund speech from "persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity." *Id.* at 413. It did not endorse *Abood*'s tolerance of the chargeable portion of the agency fee as correct, and, as this case demonstrates,

Unlike in *Abood*, the objector was not labeled a "free rider" for hoping to avoid paying its "fair share" for group-generated "benefits" it did not want. Rather, the Court cited *Barnette*, *Wooley*, and *Abood* (for its willingness to disallow compulsion of the non-chargeable portion of the agency fee), and stressed the importance of respecting the individual grower's viewpoint:

> The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.

United Foods, 533 U.S. at 410. And because the Mushroom Council existed almost entirely to engage in the speech with which the dissenter disagreed, the common-cause interest of the group did not justify the mandatory fee. *Id.* at 415-16.

D. The Very Labeling Of Dissenters As Potential "Free Riders" Revealed *Abood*'s Insensitivity To Individual Speech Interests.

Abood's willingness to embrace the union's "free rider" vernacular caused it to minimize the individual's speech interest from the outset. In-

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continued adherence to that aspect of *Abood* compromises both of these First Amendment principles by subjugating the objecting employees' interests to those of the union.

deed, the majority's analysis treated compulsion of the entire agency fee as if it were the proper status quo: one of its key passages concluded that, as long as the union "promote[s] the cause which justified bringing the group together, the individual cannot *withdraw his financial support* merely because he disagrees with the group's strategy." 431 U.S. at 223 (quoting Street, 367 U.S. at 778) (Douglas, J., concurring) (emphasis added).

But the question, of course, is whether the State violates the First Amendment by forcing the dissenting teacher to provide that "financial support" in the first place, not whether she should be *allowed* to "withdraw" it. *Cf. Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 187 (2007) (a restriction on the use of agency fees is "not fairly described as a restriction on how the union can spend 'its' money; it is a condition placed upon the union's extraordinary *state* entitlement to acquire and spend *other people's* money.") (emphasis in original); *see also id.* at 185 ("[U]nions have no constitutional entitlement to the fees of nonmember-employees.").

Many teachers, including petitioners here, flatly disagree with *Abood*'s presumption that all teachers benefit from collective bargaining and fundamentally disagree with the union's collective bargaining positions. *See* Pet. Br. 23-24, Pet. App. 45a-46a (Complaint, ¶ 7). It is certainly no answer to say that such a person should no longer work as a teacher. The "government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment." *Abood*, 431 U.S. at 234.

Consider the case of a young teacher, confident in her abilities, who opposes rigid tenure rules, including, for example, "last in/first out" rules that require new teachers to get laid off first. Or consider an ambitious teacher of any age who simply objects to a tenure system and strongly favors a merit-based system. Why are their views entitled to less respect than the mushroom grower in *United Foods* who thought their product was superior and therefore objected to a forced marketing fee?

Abood denigrates the dissenting teachers as "free riders" on the assumption that they don't know what is best for them. But who is more of a "free rider," the mushroom grower who may benefit marginally from generic advertising paid by other growers, or one of 330,000 teachers who believes that the CTA's positions fundamentally harm not just herself, but also the state as a whole and the children in her classroom? The dichotomy is all the more perverse considering that the dissenting teacher is being forced to support union speech that urges the state to continue spending billions of dollars on a teacher-tenure regime found by a court to be so flawed that it violated the state's minimal constitutional guarantee for a quality education.[9]

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[9] In *Vergara v. California*, No. BC 484642, slip op. at 8, 11, 15 (Cal. Super. Ct. Aug. 27, 2014), the Los Angeles County Superior Court held that a series of job-security statutes backed by the California Teachers Association ("CTA") violated students' rights under the State constitution. Pet. at 18-19; *see Vergara* slip op. at 8 (evidence of the detrimental effect of "grossly ineffective teachers" on students "shocks the conscience"). The litigation and the under-

That *Abood* persists in a system that affords greater constitutional dignity to the dissenting mushroom grower than the dissenting teacher is not just an "anomaly." *Knox*, 132 S. Ct. at 2290. It is an affront to teachers who dare to dissent from their union's orthodoxy.

II. *Abood*'s Mistaken Focus On Collective Interests Led To Additional Errors.

As a result of its elevation of the public employee union's "common cause" interests over the objector's First Amendment interests, *Abood* bears little resemblance to the long line of cases requiring that the government justify a speech restriction under heightened constitutional scrutiny.

A. *Abood* Improperly Accepted That The State's Asserted Interests "Presumptively Support" An Agency Fee Regime.

Abood did not analyze the constitutionality of the chargeable portion of the agency fee using any recognizable form of "exacting scrutiny" required in compelled speech cases. *Knox*, 132 S. Ct. at 2289 ("[C]ompulsory subsidies for private speech are subject to exacting First Amendment scrutiny."); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (infringements on the right to associate

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lying tenure policies became the critical issue in the 2014 race for California Superintendent of Public Instruction, where the CTA spent $11 million to support the incumbent. John Fensterwald, *Superintendent race turns on future of reform*, EdSource (Nov. 1, 2014), online at http://bit.ly/1DQSdJ6.

must be "justified" by "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."); *see also Pacific Gas*, 475 U.S. at 19 (commission order compelling utility to assist ratepayer communication "could be valid if it were a narrowly tailored means of serving a compelling state interest").

Thus, as *Knox* and *Harris* showed, traditional First Amendment analysis would call on the government or the union to show that the union cannot achieve its goals *without* compelled agency fees. *See Harris*, 134 S. Ct. at 2641 ("The agency-fee provision cannot be sustained unless the cited benefits . . could not have been achieved if the union had been required to depend for funding on the dues paid by those . . who chose to join."); *Knox*, 132 S. Ct. at 2291 ("any procedure for exacting fees from unwilling contributors must be 'carefully tailored to minimize the infringement' of free speech rights," which requires that "measures burdening the freedom of speech or association must serve a 'compelling interest' and must not be significantly broader than necessary to serve that interest.").

Quite the contrary, *Abood* assumed that no such showing by the government or the union was required, because the "important government interests recognized in the *Hanson* and *Street* cases *presumptively support the impingement* upon associational freedom created by the agency shop."[10]

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[10] *See also* Norman L. Cantor, *Forced Payments to Service Institutions and Constitutional Interests in Ideological Non-Association*, 36 Rutgers L. Rev. 1, 14 (1983) (in *Abood*, "the

431 U.S. at 225 (emphasis added). As such, *Abood* not only failed to hold the union to a level of heightened scrutiny, it violated the fundamental First Amendment rule that the party seeking to limit speech rights must always bear the burden of justifying the abridgment. *See, e.g., United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). As Justice Powell put it in *Abood*, "[b]efore today it had been well established that when state law intrudes upon protected speech, the State itself must shoulder the burden of proving that its action is justified by overriding state interests." 431 U.S. at 263 (Powell, J., concurring in the judgment); *id.* at 259-60 (noting that "exacting scrutiny" should apply).

In any event, it would surely be impossible to make this showing given the conclusion in *Harris* that "[a] union's status as exclusive bargaining agent and the right to collect an agency fee from non-members are not inextricably linked." 134 S. Ct. at 2640. Indeed, federal public employee unions advocate for union and non-union employees despite a federal *prohibition* on mandatory agency fees under federal law, 5 U.S.C. § 7102 (*see Harris*, 134 S. Ct. at 2640).

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government interests in promoting labor peace [were not] quantified or assessed in any careful fashion. Instead, the opinion accepts on faith the concept that maintenance of an agency shop contributes materially to labor peace and asserts that the scale tips in favor of worker ideological interests somewhere beyond forced collection for contract-related expenses.")

Likewise, 23 states forbid mandatory agency fees for public employees. *See* Daniel DiSalvo, Government Against Itself 64-66 (Oxford Univ. Press 2015). And, as Petitioners note, advocacy organizations of all types speak out for their constituent dues-paying members and all similarly situated persons without the "extraordinary power" of compelling support by all who "benefit" from such advocacy. *See* Pet. at 25-26; *cf. Davenport*, 551 U.S. at 184 (referring to "extraordinary power" to coerce agency fees). In the same way, fourteen years after *United Foods* held that growers could not be compelled to pay for the Mushroom Council's speech, the Council remains alive and well, and "plays a very important role in the national promotion of fresh mushrooms." *See* Mushroom Council, *About the Mushroom Council*, online at http://mushroomcouncil.org/about-the-mushroom-council ("[f]rom the caves of Paris to the dinner tables of millions of Americans, fresh mushrooms have come out of the dark and into a spotlight").

Here, given the sums that CTA now collects and spends on politics, *see infra*, and given the basic reality that money is fungible, *Knox*, 132 S. Ct. at 2293 n.6 ("our cases have recognized that a union's money is fungible"), even if CTA's funding declines without the luxury of objectors' forced agency fee, one cannot plausibly argue that CTA will be unable to continue its bargaining activities. *See Harris*, 134 S. Ct. at 2641. CTA certainly does not take this position, at least internally. CTA informs its members that it has already begun "to address long-term approaches to the loss of Fair Share." *See* Cal. Teachers Ass'n, *Not if, but*

when: Living in a world without Fair Share . . . (July 2014) at 20, online at http://bit.ly/1DswFRS; *id.* (asking, "What is it like to work in an environment where members must be signed up each year?"); *id.* at 22 ("[p]lanning, organizing, and preparedness will ensure our continued organizational strength").

B. *Abood* Wrongly Accepted That Monetary "Benefits" From Collective Bargaining Compensate For Dissenters' First Amendment Harms.

Abood's acceptance of the "free rider" justification for the compelled agency fee flips the governing rule of speaker autonomy on its head: Notwithstanding the dissenter's stated position that they strongly oppose being forced to support the union's speech activities, *Abood* accepts at face value the claim that the dissenter "nevertheless obtain[s] *benefits* of union representation that necessarily accrue to all employees,"[11] so therefore the burden on their First Amendment right is acceptable.[12]

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[11] *Abood*, 431 U.S. at 222 (citing *Street*, 367 U.S. at 761; *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 415 (1976); and *N.L.R.B. v. General Motors Corp.*, 373 U.S. 734, 740-41 (1963)). The Court's acceptance of the "free rider" justification in each of those cases, however, was rooted in *deference to a congressional determination* that free rider concerns outweighed speech burdens on dissenting *private*-sector workers.

[12] The free-riding presumption is undermined by the divergent interests of workers subject to modern public-sector collective bargaining agreements; "[i]n the absence of a common interest, the likelihood of free riding by dissenting workers plummets." *See* Harry G. Hutchison, *Reclaiming*

In doing so, *Abood* improperly presumed *as a constitutional matter* that some measure of monetary "benefit" can justify forcing citizens to support a cause they verify is abhorrent to them. (*Abood* did not say how much "benefit" was enough, however.) Such a rule not only smacks of paternalism, it is premised on the notion that constitutional protections can be sold—involuntarily—to the government for a price.

But there is no "just compensation" exception to the First Amendment's protection, and *Abood* was wrong to invent one. In matters of belief, it is unclear how *any* amount of monetary "benefit" can overcome the First Amendment harm associated with being forced to support an organization over one's objection. *Cf. Elrod*, 427 U.S. at 356 (*Barnette*'s prohibition on forced orthodoxy cannot be imposed "[r]egardless of the nature of the inducement"). This is why courts throughout the Nation agree, in First Amendment challenges to speech restrictions that seek preliminary injunctions, damages are not an adequate remedy for First Amendment harms. *See, e.g., Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir.1982) ("In [First Amendment] cases the quantification of injury is difficult and damages are therefore not an adequate remedy."); *Legend Night Club v.*

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the First Amendment Through Union Dues Restrictions?, 10 U. Pa. J. Bus. & Emp. L. 663, 696 (2008). Professor Hutchinson explains: "While strategic behavior within a labor union setting may create plausible opportunities that produce positive externalities wherein individuals obtain goods without bidding for them, free riding produced by interest convergence may not necessarily exist—since interest convergence itself may not exist." *Id.* (citation omitted).

Miller, 637 F.3d 291, 302 (4th Cir. 2011) ("[M]onetary damages are inadequate to compensate for the loss of First Amendment freedoms."); *Nelson v. Nat'l Aeronautics & Space Admin.*, 530 F.3d 865, 882 (9th Cir. 2008), *rev'd and remanded on other grounds*, 562 U.S. 134 (2011) ("Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages . . ."); *accord Elrod*, 427 U.S. at 373 ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

In sum, forcing dissenters to pay for "benefits" they do not want is incompatible with the general rule of speaker autonomy.

C. *Abood*'s Goal Of Vindicating Statutory Labor Policy Was Wrong On Many Levels.

Harris explained that *Abood*'s reliance on cases interpreting the RLA and NRLA was improper for many reasons, but at least one more should be added to the list: constitutional rules are not built on the vindication of statutory policy. For instance, in rejecting the "Millionaire's Amendment," the Court stressed that the "drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Davis*, 554 U.S. at 739.

Abood, however, reached the opposite conclusion: It decided that "such interference as exists [through the agency fee] is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress."

431 U.S. at 222; *id.* at 224 ("The governmental interests advanced by the agency-shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law.").

At the time *Abood* was decided, moreover, public employee unionism was still in its relative infancy. Indeed, through the 1950s, "many states forbade government workers from joining unions, and when they could join unions, union rights were highly restricted." DiSalvo at 40 (also noting that only three states had collective bargaining laws for state and local employees in 1959, and the number grew to 33 by 1980). States are entirely free to forbid the practice of public employee unionization, and three states currently do so. *Id.* at 41; *see also Davenport*, 551 U.S. at 189 (referring to agency fee regime as the "extraordinary and totally repealable authorization to coerce payment from government employees").

It is a mystery, then, why *Abood* looked as it did to the National Labor Relations Act (NLRA) and the Railway Labor Act as the guideposts for measuring the union's interest as a justification for abridging dissenters' speech rights. *Abood*, 431 U.S. at 218-28. President Franklin Roosevelt signed the NLRA in 1935. 29 U.S.C. § 151 *et seq.* The law did not cover public employees, and, indeed, President Roosevelt categorically opposed the notion that public employees should *ever* be allowed to collectively bargain:

> Meticulous attention should be paid to the special relations and obligations of public servants to the public itself and to the

> Government. . . . The process of collective bargaining, as usually understood, cannot be transplanted into the public service.

DiSalvo at 43 (citing Samuel I. Rosenman, The Public Papers and Addresses of Franklin D. Roosevelt 325 (Random House 1937)).

Policymakers in that era, well aware of the strife that led to legislation protecting *private* labor unions' activities, nevertheless objected to *public* employee unions—for precisely the reasons that public collective bargaining so strongly implicates public employees' First Amendment interests:

> The dominant understanding, regardless of political viewpoint—from labor leaders to conservative Republicans—was that collective bargaining would interfere with the sovereignty of government by delegating a piece of policymaking authority to union representatives in collective bargaining negotiations.

DiSalvo at 40.

Looking back, it is astonishing how quickly CTA leveraged the *Abood* anomaly. CTA did not have the right to bargain collectively and take in agency fees under California law until 1975, S.B. 160, 1975-1976 Reg. Sess. (Cal. 1975), yet it gained near-complete dominance over California politics soon thereafter. In 2010, the California Fair Political Practices Commission measured all campaign and lobbying reports from 2000-2009 and identified the 15 largest political spenders, whose collective political expenditures totaled $1 billion. Cal. Fair Political Practices Comm'n, *Big*

Money Talks: California's Billion Dollar Club at 11 (March 2010), online at http://www.fppc.ca.gov/reports/Report31110.pdf. CTA lapped the field with more than $211.8 million in such expenditures. The next-closest political player during the time period, an affiliate of SEIU (the union at issue in *Knox*), spent $107.4 million. The report shows that, together, CTA's and SEIU's spending on politics ($319 million) outpaced by more than $96 million the political spending by the four largest associations representing business interests *combined*.[13]

The extraordinary power to coerce agency fee payments has thus led to extraordinary political power. At a minimum, the extent of CTA's political spending undermines any claim it may continue to make that it cannot perform its collective-bargaining functions in the absence of coerced agency fees.

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[13] Collectively, the Pharmaceutical Research and Manufacturers of America, California Hospital Association, California Chamber of Commerce, and Western States Petroleum Association spent $222,474,639 during the period. *Big Money Talks* at 11.

CONCLUSION

Abood's forced agency fee regime cannot survive scrutiny under traditional First Amendment principles. The Court should overrule *Abood*.

Respectfully submitted,

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September 2015